QUESTION PESENTED

Whether focused and intentional police observation of a private residential yard from an airplane is a search under the Fourth Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
MODIFICATION OF QUESTION PRESENTED	1
OPINION BELOW	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	1
A. Facts	1
B. The Case In The Courts Below	4
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I	
DELIBERATE POLICE INTRUSION INTO A PRIVATE BACKYARD IMPLICATES THE FOURTH AMENDMENT	5
A. A Suburban Backyard Surrounded By A High Fence Is The Core Of The "Curtilage" As That Term Is Used For Purposes Of Interpreting The Fourth Amendment	6
B. The Curtilage Of A Home Is Protected From A Search To The Same Extent As The Home Itself	7
II	
AERIAL SURVEILLANCE OF THE PRIVATE AREAS OF THE CURTILAGE QUALIFIES AS A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT	12
A. The Avoidance Of A Physical Intrusion By The Use Of An Airplane Does Not Negate A Fourth Amendment "Search."	13
B. The Limited Scope Of The Surveillance Did Not Prevent It From Being A Search	17
1. This Search Was More Intrusive Than The One Held Unconstitutional In *United States* v. *Karo*	18
2. The Chilling Effect Of Aerial Surveillance Of Backyards Is Incompatible With The Fourth Amendment	19
3. Only The Warrant Clause Provides Appropriate Limits For Technological Surveillance Of Private Areas Without Physical Intrusion	22

Table of Contents Continued

	Page
C. Where The Reason For A Warrantless Search Is To Evade The Warrant Requirement, The Search Is Invalid	26
III	
RESPONDENT DID NOT WAIVE HIS FOURTH AMENDMENT RIGHTS BY FAILING TO ENCLOSE HIS BACKYARD	29
IV	
THE ADMINISTRATIVE WARRANT SOLUTION	30
V	
CONCLUSION	31

TABLE OF AUTHORITIES

Page

Air Pollution Variance Bd. v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974) 12
Barnatto v. *State of Nevada*, 501 P.2d 643 (1972)..... 9
Boyd v. *United States*, 116 U.S. 616, 29 L.Ed. 746, 6 Sup.Ct. 524 (1886) 8
Camara v. *Municipal Court*, 387 U.S. 523 (1967).... 23, 31
Care v. *United States*, 231 F.2d 22 (10th Cir. 1956)..... 6
Commonwealth of Pennsylvania v. *Eshelman*, 383 A.2d 838 (1978)..... 9
Commonwealth v. *Simmons*, 417 N.E.2d 1193 (Mass. 1981)..... 9
Davis v. *United States*, 327 F.2d 301 (9th Cir. 1964) 28
Dean v. *Superior Court*, 35 Cal.App.3d. 112 (1973)..... 25
Dow Chemical Co. v. *United States*, (6th Cir. 1984) 749 F.2d 307 10
Dulek v. *United States*, (6th Cir. 1926) 16 F.2d 275..... 11
Fixel v. *Wainwright*, (5th Cir. 1974) 492 F.2d 480 9
Fulbright v. *United States*, 392 F.2d 432 (10th Cir. 1968) 11
Gonzalez v. *State of Texas*, 588 S.W.2d 355 (1979)..... 9
Harris v. *United States*, 331 U.S. 145 19
Hayes v. *Florida*, ___ U.S. ___ (March 20, 1985, 53 L.W. 4382)..... 19
Hester v. *United States*, 265 U.S. 57, 68 L.Ed. 898, 44 Sup. Ct. 445 (1924)..... 8, 11
Katz v. *United States*, (1967) 389 U.S. 347..... 12, 13, 14, 15, 20, 30
Kelly v. *The State*, 147 Ga. App. 179, 245 S.E.2d 872 (1978) 9
Lamont v. *Postmaster General*, 381 U.S. 301 (1965).... 24
Maine v. *Thornton*, 466 U.S. ___ 6
Michigan v. *Clifford*, ___ U.S. ___, 52 L.W. 4058 (1984)..... 26, 27, 28, 31
Nat. Org. for Reform of Marijuana Laws v. *Mullen*, 608 F.Supp. 945 (D.C. Cal. 1985) 25
Oliver v. *United States*, 466 U.S. ___, 80 L.Ed.2d 214, 104 Sup.Ct. 1735 (1984)..... 6, 7, 8, 9, 15, 16
Olmstead v. *United States*, (1928) 277 U.S. 438..... 13, 20
People v. *Ciraolo*, 161 Cal.App.3d 1081 (1984)..... 1, 9

Table of Authorities Continued

Page

People v. *Sneed*, 32 Cal.App.3d 535 (1973)..... 9, 25
People v. *Superior Court (Spielman)*, (1980) 102 Cal.App.3d 342, 162 Cal.Rptr. 295 28
Rakas v. *Illinois*, 439 U.S. 128..... 16
Randall v. *State of Florida*, 458 S.2d 822 (D.C. Fla. 1984) 11
Silverman v. *United States*, (1961) 365 U.S. 505..... 13
State of Hawaii v. *Knight*, 621 P.2d 370 (1980)..... 21
State of New Hampshire v. *Hanson*, 313 A.2d 730 (1973) 9
State of Oregon v. *Blacker*, 630 P.2d 413 (1981)..... 21
State v. *Buchanan*, 432 S.W.2d 342 (Mo. 1968) 9
State v. *Davis*, 51 Or. App. 827, 627 P.2d 492 (1981).... 9, 14
United States v. *Allen*, 675 F.2d 1373 (9th Cir. 1980) 6, 11, 29
United States v. *Bailey*, 444 U.S. 394 (1980)..... 8
United States v. *Bassford*, 601 F.Supp. 1324 (D. Maine 1985)..... 6, 12
United States v. *Broadhurst*, ___ F.Supp. ___ (E.D. Cal. June, 21, 1985)..... 26, 31
United States v. *Davis*, (5th Cir. 1969) 423 F.2d 974 9
United States v. *FMC Corp.*, (W.D.N.Y. 1977) 428 F.Supp. 615 9
United States v. *Hensel*, 699 F.2d 18 (1st Cir. 1983) 11
United States v. *Hersh*, 464 F.2d 228 (9th Cir. 1972).... 28
United States v. *Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 104 Sup. Ct. 3296 (1984)..... 17, 18, 19, 20, 23
United States v. *Kim*, 415 F.Supp. 1252 (D. Hawaii 1976)..... 21, 31
United States v. *Lace*, 669 F.2d 46 (2nd Cir. 1982)..... 11
United States v. *Lee*, (1927) 274 U.S. 559 20
United States v. *Leon*, 468 U.S. ___ (1984)..... 3
United States v. *Minton*, 488 F.2d 37 (4th Cir. 1973).... 11
United States v. *Molkenbur*, (8th Cir. 1970) 430 F.2d 563 9
United States v. *Montoya de Hernandez*, ___ U.S. ___, 53 L.W. 5048 (July 1, 1985)..... 7
United States v. *Roberts*, 747 F.2d 537 (9th Cir. 1984) .. 11
United States v. *Swart*, (7th Cir. 1982) 679 F.2d 698.... 9
United States v. *Taborda*, 635 F.2d 131 (2nd Cir. 1980).. 21
United States v. *van Dyke*, 643 F.2d 992 (4th Cir. 1981). 6

Table of Authorities Continued

	Page
United States v. *Vilhotti*, 323 F.Supp. 425 (S.D.N.Y.) 1971)	15
United States v. *White*, 401 U.S. 745 (1971)	15, 17
United States v. *Williams*, 581 F.2d 451 (5th Cir. 1978)	6, 28
Wattenburg v. *United States*, 388 F.2d 853 (9th Cir. 1968)	6, 9
Winston v. *Lee*, 53 L.W. 4367 (1985)	20
CONSTITUTIONS	
United States Constitution:	
Fourth Amendment	1, *passim*
OTHER AUTHORITIES CITED	
Amsterdam, *Prospectives On The Fourth Amendment*, 58 Minn. L. Rev. 349, 403 (1974)	15
4 Blackstone, Commentaries *225	11
Gavison, *Privacy And The Limits Of Law*, 89 Yale L.J. 421, 423 and n.11 (1980)	22
Grange, *Visual Remote Sensing In Privacy Interests Of The Fourth Amendment*, 1 Northrup Univ. L.J. 33 (1980)	22
La Fave, *Search and Seizure, A Treatise on the Fourth Amendment*, (1978)	
Section 2.1	14
Section 2.2(c) and (d)	21
Section 2.3(c)	21
P. Kimball, *The File* (1983)	24
Thornton, *Police Use of Sense-Enhancing Devices And The Limits Of The Fourth Amendment*, 1977 Law Forum 1167 (1977)	22
Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257, 301-302, n.220 (1984)	24
6 University of Michigan J.L. Ref. 153, 179-180 (1972)	15

MODIFICATION OF QUESTION PRESENTED

Respondent's question presented is slightly different from that presented by petitioner because this case concerns an intentional viewing from the air of a place known to the police to be private. It does not concern an unplanned sighting of alleged contraband from the air, nor does it concern an unfocused police patrol.

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Five, is reported at 161 Cal.App.3d 1081, 208 Cal.Rptr. 93 (Pet. App. A).

CONSTITUTIONAL PROVISION INVOLVED

Ordinarily a respondent would not have to repeat petitioner's statement under this heading. However, petitioner has chosen to omit the Warrant Clause in its statement of the Fourth Amendment and therefore respondent states the Amendment in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Facts

An anonymous telephone message caused an investigation by Detective John Shutz of the Santa Clara Police Department, an officer trained and experienced in marijuana identification and cultivation detection. (J.A. 9, 21.) The message read:

> Can see grass growing in yard, Stebbins by Clark, S/B on left [J.A. 11, 30.]

After personally investigating the area, presumably from the public streets and sidewalks, Shutz located a "suspect residence" (J.A. 11) on Clark Avenue.[1] Shutz could not see any marijuana from the street. However, respondent's residence became suspect because of his attempt to preserve his privacy. Shutz believed that marijuana cultivators frequently conceal gardens by elevated fences; respondent's "inner yard" was surrounded by a fence built to a height of approximately ten feet. (J.A. 11-12; 38).

Solely because of the existence of the elevated fence (J.A. 37) Detective Shutz chartered an airplane. Accompanied by Agent R. Rodriguez of the Santa Clara County Narcotics Task Force, an expert in detecting marijuana cultivation from the air, as well as by the pilot of the plane, he flew to the Ciraolo neighborhood. They were able to overcome the security of the fence by visual observation from an altitude of 1,000 feet and by taking a photograph of their view including the neighboring homes and backyards. (J.A. 13; Exh. A to the Search Warrant Affidavit, J.A. 48-49.) They were then able to identify plants as marijuana.

Shutz placed this information in a search warrant affidavit and a warrant issued which was executed at the Ciraolo residence and resulted in a criminal prosecution. Respondent properly moved to suppress the evidence

---

[1] This appears to be a variance from the tip which placed the yard on Stebbins. The two streets run together as can be seen from the photograph which is Exhibit A to the search warrant affidavit and a part of this record, J.A. 48-49.

obtained from the aerial surveillance.[2] The viewing and photography of the backyards was without notice to the residents and without authority of a warrant. No attempt to obtain a warrant was made by the searching officers. In addition to the 10-foot inner fence, respondent's backyard had a 6-foot outer fence and was as private as he could make it, considering its suburban setting, without depriving his backyard of sunlight. As shown by the photograph attached to the search warrant, respondent's house itself furnished one border of the inner yard. Except for the Fourth Amendment and FAA safety regulations (*see* note 14, *infra*), nothing in California or federal law limited the overflight as to time, intensity, place, manner, things to be seized or viewed, requirement of notice that it had taken place or written return as to the results.

The search warrant as requested and issued by a magistrate commanded the police to search respondent's entire home, attached garage and ground areas in the most intense manner so as to allow seizure of, *inter alia*, marijuana, "correspondence," and "notes, records, customer lists and price lists, relating to the sales of marijuana." (J.A. 5.)

There was no evidence as to whether other aircraft had flown over respondent's backyard, although at some time during the flight, which focused on a number of other locations in addition to respondent's backyard, Officer Shutz testified that the airplane was "in a flight line with the San Jose Airport." (J.A. 38.)

---

[2] This court in granting certiorari specifically declined to review the conclusion of the court below that nothing in *United States* v. *Leon*, 468 U.S. ____ (1984) allows a search warrant to be grounded on illegally obtained evidence.

B. The Case In The Courts Below

In the trial court, respondent's motion to suppress the evidence was denied. (J.A. 65.) Respondent was convicted on a cultivation of marijuana charge. His sentence was not "probation" as stated at Petitioner's Brief, p. 5, but 120 days in the county jail, $750 fine, surrender of his rights to be free of unreasonable search and seizure, participation in a counseling program, and probation. (C.T. 93; R.T. 11-12.) His conviction was appealed to the Court of Appeal, First Appellate District, Division Five, which reversed the conviction and ordered suppression of the fruits of the aerial search of the inner backyard on the basis that it violated the Fourth Amendment. *See* Appendix A to the Petition. The court below, viewing the specific intention to breach respondent's protected curtilage as a "direct and unauthorized intrusion into the sanctity of the home," ruled the overflight an unreasonable search in violation of the Warrant Clause of the Fourth Amendment.

SUMMARY OF ARGUMENT

Respondent is entitled to the same protections in his enclosed, suburban backyard as in his home against warrantless searches for crime. Neither the limited scope of the information revealed by the aerial intrusion nor its lack of physical penetration are relevant to depriving respondent of his Fourth Amendment security rights.

Not only respondent's privacy, but an entire social attitude is at risk in this case. We face an explosion in technological advances capable of intruding into those aspects of life normally thought of as free of governmental surveillance unless the surveillance is authorized by a magistrate. Deprived of normally anticipated security, our society will lose values at the core of its strength.

The decision of the police to jump respondent's fence by the warrantless use of an airplane was a deliberate and unnecessary evasion of the warrant requirement for the purpose of gathering evidence of crime. There is no waiver of Fourth Amendment rights by failing to retreat indoors when someone does not wish to be spied upon by the government. Vulnerability to an occasional view from a passing airplane is not comparable to a focused search, by trained experts, in an attempt to gather evidence of crime.

Application of the Warrant Clause to the facts of this case would provide needed protections against unrestrained police investigations using technological advances which interfere with normal concepts of privacy. An administrative warrant solution is also possible where government inspections to enforce the laws are an appropriate enforcement procedure.

ARGUMENT

I

DELIBERATE POLICE INTRUSION INTO A PRIVATE BACKYARD IMPLICATES THE FOURTH AMENDMENT

Only after discovering that one backyard in the area mentioned in the anonymous tip had a fence preventing surveillance from the ground did the police decide to undertake a warrantless intrusion of this private enclave from the air. Under this Court's decisions and the prior law in state and federal courts interpreting the Fourth Amendment, the area targeted for intrusion by the police was (A) within the curtilage of Mr. Ciraolo's home and (B) protected by the Warrant Clause from police intrusion to the same extent as was his home.

A. A Suburban Backyard Surrounded By A High Fence Is The Core Of The "Curtilage" As That Term Is Used For Purposes Of Interpreting The Fourth Amendment.

This is not a case calling for the resolution of the outer perimeters of the sometimes-vague concept of "curtilage." *See, e.g., Wattenburg* v. *United States*, 388 F.2d 853, 857-858 (9th Cir. 1968) (Wood pile 35 feet from home within curtilage); *United States* v. *Williams*, 581 F.2d 451, 453 (5th Cir. 1978) (shed 150 feet from home within curtilage); *United States* v. *van Dyke*, 643 F.2d 992, 994 (4th Cir. 1981) (fence, 150 feet from residence, was the outer boundary of the curtilage); *Care* v. *United States*, 231 F.2d 22, 25 (10th Cir. 1956) (cave across a road from the residence not within the curtilage). The brief for the petitioner in this case concedes the police intrusion into Ciraolo's curtilage, Petitioner's Brief, pp. 12-13, 26, arguing only that the curtilage was open to public view. As can be seen from the photograph which is Exhibit A to the search warrant affidavit,[3] the alleged marijuana plants were within an arm's reach of Ciraolo's back windows in a small backyard. Our case does not involve the fields of commercial marijuana growers as did *Oliver, Thornton, Allen* and *Bassford*.[4] It involves the core area of the curtilage where the home gives private access to natural light and air, the backyard. In the following paragraphs,

---

[3] This photograph is a part of the record before this Court, *see* J.A. 48-49.

[4] *Oliver* v. *United States* and *Maine* v. *Thornton*, 466 U.S. ____; *United States* v. *Allen*, 675 F.2d 1373 (9th Cir. 1980); *United States* v. *Bassford*, 601 F.Supp. 1324 (D. Maine 1985). Although the *Bassford* case might involve a backyard, the facts are not clearly described. In any event the Judge in *Bassford* makes it clear that he declines to draw any distinction between curtilage and noncurtilage when it comes to reasonable expectations of privacy from aerial viewing by the police. *See* 601 F.Supp. 1324, 1331.

we demonstrate from our legal history that society recognizes and protects the privacy of the backyards of homes to the same extent as the interiors of homes.

B. The Curtilage Of A Home Is Protected From A Search To The Same Extent As The Home Itself.

The wording of the Fourth Amendment does not expressly bring the curtilage of a home within its protections; yet there is universal agreement that it is encompassed by those words. A "house" is more than four walls; it includes, at the least, a religious symbol attached to the outside wall, a patio directly leading to the house and an enclosed yard into which the home's residents pass freely while still protected by the security of their home. It is not a "person" or a "paper" and its characterization as an "effect" is unsupported by any historical precedent[5] or case law. The curtilage, logically and textually, must be considered an inseparable part of the "house."

Putting aside the "open view" exception to (or waiver of) Fourth Amendment protection, it is analytically possible that certain portions of the "house" should be given more stringent protection under the Fourth Amendment than others. However, there is no discussion of such a differentiation in the case law or literature concerning the Fourth Amendment's protection of houses. Nor, respondent believes, is such a differentiation workable or wise. The complexities of the Fourth Amendment are sufficient[6] without setting still another constitutional stan-

---

[5] *See Oliver* v. *United States*, 466 U.S. ____, 80 L.Ed.2d 214, 223, n.7.

[6] *Cf. United States* v. *Montoya de Hernandez*, ____ U.S. ____ 53 L.W. 5048, 5050 (July 1, 1985):

> We do not think that the Fourth Amendment's emphasis upon reasonableness is consistent with the creation of a third verbal

dard for illegal searches and seizures.[7]

This topic seems controlled by the recent decision in *Oliver* v. *United States*, 466 U.S. ___, 80 L.Ed.2d 214, 104 Sup.Ct. 1735 (1984). There the Court stated at 80 L.Ed.2d 225:

> The distinction [between "open fields" and "curtilage"] implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections *that attach to the home*. (Emphasis supplied.)

This statement makes the protections accorded to the home by the Fourth Amendment applicable to protect the privacy of the curtilage. No distinction is drawn between the home and the curtilage for Fourth Amendment purposes:

> At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," *Boyd* v. *United States*, 116 U.S. 616, 630, 29 L.Ed. 746, 6 Sup.Ct. 524 (1886), and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage. . . . [*Oliver*, *supra*, 80 L.Ed.2d at 225]

Neither the holding of *Oliver* nor the rule of *Hester* v. *United States*, 265 U.S. 57, 68 L.Ed. 898, 44 Sup.Ct. 445 (1924) reaffirmed in *Oliver*, applies "in the area imme-

---

standard in addition to "reasonable suspicion" and "probable cause"; we are dealing with a constitutional requirement of reasonableness, not *mens rea*, *see United States* v. *Bailey*, 444 U.S. 394, 403-406 (1980), and subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question.

[7] Page 26 of the Brief for Petitioner argues that "certainly no *greater* rights attach to the curtilage than to the interior of the home." (Emphasis supplied.) Respondent agrees.

diately surrounding the home." *Oliver*, *supra*, 80 L.Ed.2d at 224.[8]

As demonstrated by the three circuit court cases referred to by this Court in its *Oliver* opinion to illustrate the Fourth Amendment's protection of the curtilage (80 L.Ed.2d at 225), the lower federal courts have drawn no distinction between the Fourth Amendment protections afforded the curtilage and those afforded the home. *See also* to the same effect, *United States* v. *Molkenbur* (8th Cir. 1970) 430 F.2d 563, 566; *Wattenburg* v. *United States* (9th Cir. 1968) 388 F.2d 853, 857; *Fixel* v. *Wainwright* (5th Cir. 1974) 492 F.2d 480; *United States* v. *Swart* (7th Cir. 1982) 679 F.2d 698; *United States* v. *Davis* (5th Cir. 1969) 423 F.2d 974, 976-977; *United States* v. *FMC Corp.* (W.D.N.Y. 1977) 428 F.Supp. 615.

The laws in the various states are also generally interpreted to give an enclosed curtilage the same privacy protection as the home.[9]

[8] It was conceded in *Oliver* and its companion case that the property searched was not within the curtilage. In footnote 11 of *Oliver* this Court left open the possibility that a different "degree" of Fourth Amendment protection might be afforded the curtilage as opposed to the home itself. Respondent argues above that the creation of a different degree of protection for the curtilage would be unwise and unprecedented. Petitioner does not argue for such a differing degree of protection nor has any case or discussion in the literature suggested a practicable means of discrimination on degrees of privacy between the different portions of the home.

[9] *See, e.g., People* v. *Ciraolo*, 161 Cal.App.3d 1081, 1089-1090 (1984); reproduced in the Appendix); *People* v. *Sneed*, 32 Cal.App.3d 535, 542 (1973); *Kelly* v. *The State*, 147 Ga. App. 179, 245 S.E.2d 872, 875 (1978); *Commonwealth* v. *Simmons*, 417 N.E.2d 1193, 1197 (Mass. 1981); *State* v. *Buchanan*, 432 S.W.2d 342, 344 (Mo. 1968); *Barnatto* v. *State of Nevada*, 501 P.2d 643, 647 (1972); *State of New Hampshire* v. *Hanson*, 313 A.2d 730, 732 (1973); *Commonwealth of Pennsylvania* v. *Eshelman*, 383 A.2d 838, 841 and n.8 (1978); *Gonzalez* v. *State of Texas*, 588 S.W.2d 355, 360 (1979).

A particularly compelling discussion of why there is a societal expectation that the curtilage is to be treated in the same manner as the inside of a home for Fourth Amendment purposes is found in *Dow Chemical Co.* v. *United States* (6th Cir. 1984) 749 F.2d 307; *cert. granted* June 10, 1985, No. 84-1259. In discussing why the curtilage concept could not be easily transferred from the home to a 2,000-acre complex the court stated:

> The potent individual privacy interests that inhere in living within a home expand into the areas that enclose the home as well. The backyard and area immediately surrounding the home are really extensions of the dwelling itself. This is not true simply in a mechanical sense because the areas are geographically proximate. It is true because people have both actual and reasonable expectations that *many of the private experiences of home life often occur outside the house*. Personal interactions, daily routines and intimate relationships revolve around the entire home place. There are compelling reasons, then, for applying Fourth Amendment protection to the entire dwelling area. (749 F.2d at 314, emphasis supplied.)

After noting the "peculiarly strong concepts of intimacy, personal automomy and privacy associated with the home," the Sixth Circuit emphasized that it is "fundamentally a sanctuary, where personal concepts of self and family are forged, where relationships are nurtured and where people normally feel free to express themselves in intimate ways." (749 F.2d at 314.) The inclusion of the curtilage in this concept of privacy is said to be "traditional" by the Sixth Circuit:

> In the home setting, Fourth Amendment protection applies to adjoining areas because of the unique privacy interests associated with dwelling places, and because of our traditional understanding that home

> life is not confined to the physical structure of the house. (749 F.2d at 324.)

Historically, and very soon after *Hester* v. *United States*, *supra*, the Sixth Circuit had decided that the "open fields" doctrine did not apply to the curtilage of a home in *Dulek* v. *United States* (6th Cir. 1926) 16 F.2d 275. As noted in *Oliver, supra*, 80 L.Ed.2d at 225, the common law protected the curtilage. *See also*, 4 Blackstone, Commentaries *225; La Fave, *Search and Seizure, A Treatise on the Fourth Amendment*, § 2.3(d) (1978).

Although there are isolated exceptions such as *Randall* v. *State of Florida*, 458 S.2d 822, 825 (D.C. Fla. 1984), the cases cited in petitioner's opening brief as well as others which might be cited for a lowered expectation of privacy within the curtilage, do not apply to this case. In *United States* v. *Lace*, 669 F.2d 46, 49-51 (2nd Cir. 1982) the area involved between the house and the barn was visible from a public road as well as by persons approaching the front door of the home. In *United States* v. *Minton*, 488 F.2d 37, 38 (4th Cir. 1973) no dwelling house was involved but rather a barn or warehouse. In *United States* v. *Allen*, 675 F.2d 1373 (9th Cir. 1980) the barn and truck tracks leading to the barn on a 200-acre ranch were involved; there is no mention of curtilage or observation of a dwelling house; in *United States* v. *Roberts*, 747 F.2d 537, 542-543 (9th Cir. 1984) the area viewed was a road not within the curtilage; in *United States* v. *Hensel*, 699 F.2d 18, 41 (1st Cir. 1983) the reviewing court declined to reach the merits of the Fourth Amendment claim because it was not properly presented in the court below. *Fulbright* v. *United States*, 392 F.2d 432, 433-436 (10th Cir. 1968) involves agents using binoculars from an open field to view criminal activity within the curtilage. The court required a physical intrusion before finding a violation of the Fourth

Amendment, a concept incompatible with *Katz* v. *United States* (1967) 389 U.S. 347, discussed *infra*. *United States* v. *Bassford*, 601 F.Supp. 1324 (D. Maine 1985) refuses to distinguish between curtilage and noncurtilage with regard to aerial surveillance even though it recognizes that such a distinction is proper when a physical intrusion into the curtilage is involved. The record is silent as to whether any of the marijuana plants discovered in the *Bassford* case were enclosed by fences, but this does not appear to have been significant in the District Court's decision. To the extent that *Bassford* is inconsistent with the court below in *Ciraolo*, respondent would argue that *Bassford* is in error in failing to require a warrant for aerial surveillance.

II

AERIAL SURVEILLANCE OF THE PRIVATE AREAS OF THE CURTILAGE QUALIFIES AS A "SEARCH" WITHIN THE MEANING OF THE FOURTH AMENDMENT

The facts of our case show that suspicion focused on respondent because of the high fence around his backyard. The aerial search was undertaken for the purpose of bypassing the fence and collecting evidence of criminal activity by means of a technological presence not normally anticipated in one's backyard, a focused aerial view. Petitioner argues that because casual passers-by in the air might have obtained the same view, respondent's backyard was in open view, like the outpourings of the smokestacks in *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974), and that therefore the viewing by Officer Shutz and his companions was not a "search" within the prohibitions of the Fourth Amendment. Even

as to the intimate areas of the home[10] petitioner would require an opaque covering depriving residents of free access to light and air if they wish to preserve their privacy.

Respondent argues that the technical avoidance of a physical intrusion does not negate a search within the meaning of the Fourth Amendment. The exposure of his backyard to a viewing by an occasional nondirected casual overflight is not a waiver of privacy rights. It is not reasonable to expect our society to surrender access to light and air in order to avoid waiver of constitutionally protected privacy rights.

A. The Avoidance Of A Physical Intrusion By The Use Of An Airplane Does Not Negate A Fourth Amendment "Search."

The thrust of *Katz* v. *United States* (1967) 389 U.S. 347 is more than the "expectation of privacy" concept contained in Justice Harlan's concurring opinion and now frequently relied upon in opinions for the Court. It is that a physical intrusion into a protected area is not a *sine qua non* of a Fourth Amendment "search." *Katz* made a major change in the early concept of *Olmstead* v. *United States* (1928) 277 U.S. 438 where a tap of telephone wires outside of the curtilage was held not a "search" under the Fourth Amendment. This older "constitutionally protected area" concept was stretched thin in *Silverman* v. *United States*

---

[10] In addition to the curtilage as part of the home, the interpretation of the Fourth Amendment argued for by petitioner in this case would deprive of all protection against aerial spying interior patios completely surrounded by the home in the Spanish style, as well as those areas of the home which could be seen through translucent skylights.

(1961) 365 U.S. 505 where a slight penetration into a protected area by a spike mike called forth the protections of the Fourth Amendment. It was finally broken in *Katz* where there was no physical penetration but an obvious interference with privacy concepts deeply valued in our society.

The *Katz* Court retooled the parameters of constitutionally protected privacy to meet the challenge of new technology. Whether or not a "constitutionally protected area" was involved was no longer the solution to preserving the security the Framers protected by the Fourth Amendment. A new dimension was added: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." (*Katz*, 389 U.S. at 351-352, emphasis supplied.) The reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz* at 353. Applying these rules to its facts, *Katz* held that eavesdropping with a listening device transmitting a conversation from a telephone booth without any physical trespass of the booth was a "search" and unconstitutional because the government did not obtain a search warrant for the intrusion, nor were any of the exceptions to the warrant requirement applicable.

As Professor La Fave has noted in his extensive discussion of the *Katz* case,[11] sweeping away the "constitutionally protected area" test made the definition of

[11] La Fave, *Search and Seizure, A Treatise on the Fourth Amendment*, § 2.1.

"search" both broader and more difficult.[12] In place of

[12] As to the exact criteria to determine that monitoring the conversation within the telephone booth was a "search" within the meaning of the Fourth Amendment, the *Katz* Court left that to be resolved in future cases, as is natural in the common law tradition. The Court used its own perceptions of societal values to conclude:

> One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. (389 U.S. at 352).

Justice Harlan in his well-known concurrence in *Katz* wrote that society must be prepared to recognize a claim of privacy as "reasonable." (389 U.S. at 361). In a later dissenting opinion in *United States* v. *White*, 401 U.S. 745 at 786 (1971), Justice Harlan advanced as the criterion to be applied in such cases the impact of the challenged practice on the "sense of security which is the paramount concern of Fourth Amendment liberties." Respondent believes that this is a most appropriate concern and discusses his case in these terms later in this brief.

Other commentators have used generalized criteria which we repeat here in the event they may be of value to this Court:

> [A court must take into account] both contemporary norms of social conduct and the imperatives of a viable democratic society. [*United States* v. *Vilhotti*, 323 F.Supp. 425 (S.D.N.Y. 1971).
>
> The criteria for reasonable expectations must be extracted from the flow of life, and it is the judge's task to find and articulate those societal standards. (Note, 6 University of Michigan J.L. Ref. 153, 179-180 (1972).)
>
> [The ultimate question is] whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. That, in outright terms, is the judgment lurking underneath the Supreme Court's decision in *Katz*, and it seems to me the judgment that the Fourth Amendment inexorably requires the court to make. Amsterdam, *Prospectives On The Fourth Amendment*, 58 Minn.L.Rev. 349, 403 (1974).

The *Oliver* case itself put forth a number of factors to be considered as to whether a claim to Fourth Amendment privacy is legitimate. These are (1) the intention of the Framers of the Fourth Amendment,

common law property principles, the crucial questions now require an analysis of societal considerations and values in deciding which privacy expectations are to be protected under the Fourth Amendment and under what circumstances. We have shown in the previous section of this brief that our social values and considerations give a very high priority to the need for privacy in the secluded outdoor areas of our homes. The telephone booth was a transitory and vulnerable shelter for Katz; the Ciraolo backyard is a permanent area of repose and sanctuary even more deserving of the protection of the Warrant Clause of the Fourth Amendment.

As we show below, the mere fact that there is a need to traverse most of the airspace in our busy world at some time or another does not remove a private curtilage from its constitutional protection. Mr. Katz was not deprived of the intimacy of his telephone booth merely because an observer could see him through the glass doors, or because someone in the next booth could have overheard his conversation, or because the person on the other end of the line might have granted permission for the govern-

(2) the uses to which the individual has put a location, and (3) our societal understanding that certain areas deserve the most scrupulous protection. (466 U.S. at ____, 80 L.Ed.2d at 223-224.)

Finally, Justice Powell with whom the Chief Justice concurred in *Rakas* v. *Illinois*, 439 U.S. 128, 152-153 stated four criteria for application of the *Katz* test, (1) whether the claimant to Fourth Amendment privacy took normal precautions to maintain his privacy; (2) the uses to which a location is put; (3) an historical view to ascertain the intentions of the Framers of the Fourth Amendment; and (4) what traditional property rights could be claimed. Justice White, joined in by Justices Brennan, Marshall and Stevens, dissenting in *Rakas*, *supra*, stated a more general test of asking this Court to consider what privacy rights are "essential to securing 'conditions favorable to the pursuit of happiness.' "

ment to listen to the conversation. (*United States* v. *White* (1971) 401 U.S. 745.)[13] The fact that his privacy was not absolute did not eliminate it.

Although the only warrantless intrusion made by the agents of the State into respondent's backyard was visual, *Katz* teaches that the deliberate diminution of privacy it represents is intolerable in a free society.

B. The Limited Scope Of The Surveillance Did Not Prevent It From Being A Search.

Petitioner argues (Brief, pp. 46-47) that the police used "no sophisticated technology" to expose "intimate secrets of Ciraolo's life. . . ." nor did the police fly low or enhance their views with binoculars or telescopes. In short, their activities, according to petitioner, were "reasonable." (*Ibid.*) There are several answers to these arguments. First, this Court has recently made it very clear in *United States* v. *Karo*, 468 U.S. ____, 82 L.Ed.2d 530, 104 Sup.Ct. 3296 (1984) that the extent of the governmental trespass into an area protected by the Fourth Amendment is not a significant factor in the application of the exclusionary rule once a constitutional violation is found. Second, petitioner fails to take into account the concern expressed by this Court and by thoughtful commentators about the chilling effect on freedom caused by unrestricted government surveillance of the initimate areas of our lives. Third, nothing in petitioner's chief argument—that there was no search because backyard areas already potentially visible from the air are not protected by the

[13] This Court does not decide Fourth Amendment cases on hypothetical possibilities that privacy could have been lost. *See United States* v. *Karo*, 468 U.S. ____ ____, n.4, 82 L.ed.2d 530, 542, n.4 (1984).

Fourth Amendment—would place *any* limits on the technological devices available to the police to inspect, photograph, and spy on the backyards of America.[14] When it comes to invasions of the home, the Warrant Clause of the Fourth Amendment (omitted by petitioner in the statement of the Constitutional Provision Involved, Brief, p. 3) requires that a neutral magistrate rather than the police make the decision as to invasions of privacy in the absence of emergency.

1. This Search Was More Instrusive Than The One Held Unconstitutional In *United States* v. *Karo*.

In *United States* v. *Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 104 Sup.Ct. 3296 (1984) a court order allowed the installation and monitoring of a beeper in a container of chemicals suspected as a potential ingredient for illicit drugs. Monitoring the beeper, drug agents determined that its container was inside a particular house and obtained a search warrant partially based upon that information. However, the government conceded that the warrant allowing the installation and monitoring of the beeper was defective and attempted to persuade the Court that warrantless monitoring of the beeper device within a home was consistent with the Fourth Amendment. The Court held that any uninvited penetration of the home was an unreasonable search absent warrant or emergency. Even though the only thing which the government learned from the beeper was that the marked chemicals were present in a particular residence, the case was treated as if a DEA agent had thought it useful to enter the residence surreptitously to verify the beeper's pres-

[14] The FAA standard of 1,000 feet is a safety rule; it is not promulgated or enforced for privacy reasons. *State* v. *Davis*, 51 Or.App. 827, 627 P.2d 492, 494 (1981).

ence and had done so without a warrant. The search was condemned as "indiscriminate monitoring of property that has been withdrawn from public view. . . ." (468 U.S. at ___, 82 L.Ed.2d at 542.)

Neither the difficulties associated with procurement of a warrant nor the fact that the intrusion was only "miniscule" deflected this Court's application of the warrant requirement. *See also, Hayes* v. *Florida*, ___ U.S. ___, (March 20, 1985, 53 L.W. 4382) where the Court refused to countenance a warrantless entry into a person's home even for the limited purpose of obtaining fingerprint identification and even where such entry was supported by probable cause. Thus "limited," "miniscule," and brief violations of Fourth Amendment protections of the home have always been condemned by this Court without exception.[15]

2. The Chilling Effect Of Aerial Surveillance Of Backyards Is Incompatible With The Fourth Amendment

The protections of the Fourth Amendment do more than deter the police from particular types of searches. Perhaps what is at stake has best been stated by Justice Frankfurter dissenting in *Harris* v. *United States*, 331 U.S. 145, 173:

> It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be

[15] Petitioner concedes (Brief, p.13) that an officer who jumped respondent's fence or placed a ladder against it and viewed the marijuana plants would violate reasonable expectations of privacy. As in *Karo*, the technical means of violating privacy expectations would seem to be irrelevant; no less can be seen from the air than by a peek over the fence. We might ask Petitioner to explain its position concerning use of a periscope or hook and ladder firetruck.

> said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole.

This Court recently quoted with approval what Justice Brandeis said in dissent in *Olmstead* v. *United States*, 227 U.S. 438, 478 (1928), that the Fourth Amendment protects "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." The quotation came in *Winston* v. *Lee*, 53 L.W. 4367, 4368 (1985), a case involving physical intrusion into the body to retrieve an expended bullet. Although the intrusion in our case is less immediate, in the long run it would be more damaging to the whole fabric of our society to lose the repose and security we now have in the protected areas of our homes to an ever-present, unseen but surveilling, government.

A limited number of cases have already faced the problem of the technological invasion of the home or person without warrant or physical intrusion. Of course, this Court did so in *Katz* v. *United States*, *supra*. *See also United States* v. *Karo*, *supra*, 82 L.Ed.2d at 539, where the Court mentioned a parabolic microphone capable of picking up conversations from within nearby homes, saying:

> It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence. [82 L.Ed.2d at 539-540]

In an early case, *United States* v. *Lee* (1927) 274 U.S. 559, the Court held that there was no Fourth Amendment violation by examining the open deck of a boat by a searchlight before boarding. Of course, this and other visual aids to bring objects already in open view to the

attention of the observer in greater detail cannot be compared to the deliberate invasion of a private area by a technological device.

The latter situation was faced by *United States* v. *Kim*, 415 F.Supp. 1252 (D. Hawaii 1976) where the police used a telescope to view the interior of an apartment through areas open to the light. They were able to see what the defendant was reading within his apartment. Although the government agents had the right to be where they were while they were making the surveillance, the intrusion was still held a "search" forbidden by the Fourth Amendment without warrant. In response to the government's argument that people in nearby apartments might have used telescopes to spy on Kim, the court responded that intrusion by the government is on an entirely different footing:

> The fact that Peeping Toms abound does not license the government to follow suit. In the particular context of this case, lack of concern about intrusions from private sources has little to do with an expectation of freedom from systematic governmental surveillance. [415 F.Supp. at 1256.]

If, instead of binoculars and a telescope from a distance, the police had used an airplane or helicopter to peer into Kim's open windows in his high-rise apartment, would the result have been any different? *See also*, on binocular invasions *United States* v. *Taborda*, 635 F.2d 131 (2nd Cir. 1980); *State of Hawaii* v. *Knight*, 621 P.2d 370 (1980); *State of Oregon* v. *Blacker*, 630 P.2d 413 (1981) and LaFave, *Search and Seizure, A Treatise On The Fourth Amendment*, §§ 2.2(c) and (d) and 2.3(c).

In these days of explosive technological advances (about which information is often muted by the need for security in our uneasy world), it is a commonplace that

airborne or satellite-borne surveillance equipment could perform remarkable tasks comparable to or exceeding the ability of the government agents in *Kim* to read what the defendant was reading from one-quarter mile (that is, 1,320 feet) away. *See* Grange, *Visual Remote Sensing In Privacy Interests Of The Fourth Amendment*, 1 Northrup Univ. L.J. 33 (1980); Thornton, *Police Use of Sense-Enhancing Devices And The Limits Of The Fourth Amendment*, 1977 Law Forum 1167 (1977). The presence of a threat of such unknown invasions of our privacy without probable cause may be the difference between a free society and a totalitarian society. The value of privacy is its promotion of the goals of a free nation: liberty, automomy, selfhood, spontaneity and open human relationship, and a free, open and democratic society. *See* Gavison, *Privacy And The Limits Of Law*, 89 Yale L.J. 421, 423 and n.11 (1980) Encouragement of the government to invade a private yard to overhear a private conversation or to see private activities, all within the home, by allowing technological devices an exemption from the Fourth Amendment, would be a severe blow to the values of our society.

3. Only The Warrant Clause Provides Appropriate Limits For Technological Surveillance Of Private Areas Without Physical Intrusion

In this case, petitioner seemingly wishes to limit the application of the Fourth Amendment's Warrant Clause to areas protected by four walls and an impermeable roof unless there is an actual physical intrusion by a government agent.[16] Respondent believes that the Warrant

[16] Petitioner would protect the backyard under the Fourth Amendment's Warrant Clause if the police jumped a fence or placed a ladder against it to peer into the yard. Petitioner's Brief, p. 13. Petitioner would also protect curtilage "associations, objects or activities" which would be imperceptible from the air. Petitioner's Brief, pp. 14-15. Petitioner does not indicate under what standards or criteria these protections would be applied.

Clause is applicable to this case and requires the judgment of a neutral magistrate before there is an intentional breach of the security of a curtilage in an attempt to gather evidence against a particular person.

In *United States* v. *Karo*, 468 U.S. ___, 82 L.Ed.2d 530, 104 Sup.Ct. ___ (1984), this Court once again reviewed the preference for the use of warrants when such use is practicable. "Warrantless searches are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule." (*Karo, supra*, 82 L.Ed.2d at 542-543.) The Court further commented:

> Requiring a warrant will have the salutary effect of insuring that use of beepers is not abused, by imposing upon the agents the requirement that they demonstrate in advance their justification for the desired search.
>
> * * *
>
> The argument that a warrant requirement would oblige the Government to obtain warrants in a large number of cases is hardly a compelling argument against the requirement.
>
> * * *
>
> We are also unpersuaded by the argument that a warrant should not be required because of the difficulty in satisfying the particularity requirement of the Fourth Amendment.
>
> * * *
>
> In sum, we discern no reason from deviating from the general rule that a search of a house should be conducted pursuant to a warrant. [*Karo, supra*, 82 L.Ed.2d at 543-544.]

See also, Camara v. *Municipal Court*, 387 U.S. 523 (1967).

Aerial surveillance without warrant raises another problem, that of imperceptible invasion of privacy.[17] Unless it succeeds in initiating a legal proceeding, the aerial surveillance may never come to light. Views of private backyards, whether visual or photographic, will be circulating in the police community without any responsibility to make them of record. This contributes to the building up of a dossier on individuals, the effects of which have been reviewed by this Court in *LaMont* v. *Postmaster General*, 381 U.S. 301 (1965). On the other hand, search warrant affidavits and the warrant itself are official records filed with a court so that government activities are not above review. Without such review, the aerial surveillance becomes a warrantless general warrant, a license to go anywhere, to search for anything, and only to report on it when a culprit is taken in hand.

Given the agreement by petitioner that respondent's fence could not be breached by a police officer jumping over it or peering over it from a ladder, it is apparent that the real police purpose in chartering an airplane to view respondent's backyard was to "jump" the fence and take advantage of the fact that there is no effective way to screen a backyard from aerial invasion except by depriv-

---

[17] "Even an invasion of privacy which is never revealed to the victim may do him considerable harm. Others may profit from what he thought was concealed, or they may act unfavorably, and, perhaps, unfairly toward him for reasons he never knows. *See, e.g.*, P. Kimball, *The File* (1983). Moreover, the fear that government agents are electronically listening or watching without prior judicial approval diminishes the sense of security to which the Fourth Amendment entitles "the people" collectively. Thus, it makes sense to apply the *per se* liability of the warrant requirement as a deterrent in the subgroup of cases where the invasion is not usually detectible." Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257, 301-302, n.220 (1984).

ing it of the qualities which make it a backyard. Thus the police action in this case is a deliberate attempt to evade the requirement of the Warrant Clause that the facts justifying a government invasion of privacy, absent an emergency or consent, be presented to a neutral magistrate. To some extent there is a balance to be considered: if a person's curtilage is already open to public view no warrant is required; but if a person has made clear his desire to secure his privacy, that should be sufficient to trigger the Warrant Clause requirement for the extraordinary measure of a focused and deliberate aerial breach of this privacy. Such a rule would not inhibit the police in the general use of airspace; only when the purpose of the police is to use the airspace in a deliberate attempt to breach the privacy of a resident upon whom their suspicion has focused would a warrant be required. The time-honored interposition of a detached magistrate is the appropriate method of keeping technological surveillance under control.

Aerial surveillance by the government in an attempt to substantiate suspicion of criminal activity does not involve just a single pass of an aircraft and casual glances over hundreds of square miles of territory. When focused, as in our case, it can be easily abused. *See People* v. *Sneed*, 32 Cal.App.3d 535 (1973; many passes by a helicopter sometimes as low as 25 feet); *Dean* v. *Superior Court*, 35 Cal.App.3d 112, 117 (1973; "one who builds a swimming pool and sun-bathing area in his backyard expects privacy (hence immunity) from aerial inspection. Areas reasonably used in ordinary business operations are assumedly entitled to similar immunity. Such areas are expectedly private according to the common habits of mankind." [Dictum.]); *Nat. Org. for Reform of Marijuana Laws* v. *Mullen*, 608 F.Supp. 945 (D.C. Cal. 1985; helicopter sur-

veillance of homes and curtilage involving low-flying and hovering helicopters engaged in marijuana eradication enjoined); *United States* v. *Broadhurst*, ___ F.Supp. ___ (E.D. Cal. June 21, 1985; repeated and circling airplane surveillance of a greenhouse violated reasonably expectations of privacy.) Surely it is preferable that the Warrant Clause of the Fourth Amendment draw the line in this area rather than it be drawn by an ad hoc determination of how many airplane passes were made over which property at what height and for what purpose.

Similarly, a neutral magistrate could best devise appropriate procedures to protect the backyards of persons not even suspected of crime from intrusion by visual or photographic surveillance. Now, as shown by Exhibit A to the search warrant (J.A. 48-49) there are no such protections.

C. Where The Reason For A Warrantless Search Is to Evade The Warrant Requirement, The Search is Invalid.

A criminal search with a search warrant is required if the primary object of a non-emergency residential search is to gather evidence of criminal activity. *Michigan* v. *Clifford*, ___ U.S. ___, 52 L.W. 4056 at 4058 (1984). That case shows that the purpose of the search affects its legality.[18] The constitutionality of a search must be examined in terms of several factors, given the particularly strong privacy expectations in private residence. *Id.* at 4059 and n.7 and cases there cited.

---

[18] "The constitutionality of warrantless and nonconsentual entries into fire-damaged premises, therefore, normally turns on several factors: * * * whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity." *Clifford*, 52 L.W. at 4058.

If there are legitimate privacy interests in certain areas of a home and no exigent circumstances, and the government's purpose is to determine the nature of an incident or to gather evidence of criminal activity, police investigation will be held unconstitutional absent a warrant or, at the least and under Justice Stevens' concurring view, advance notice to the owner. Furthermore, where there is no immediate need to undertake an extensive exploration of private residential premises, a warrantless continuation of an initial investigation based on exigent circumstances may even be held unjustified.

In *Clifford*, an early-morning fire destroyed the downstairs portion of a private residence. Responding fire units extinguished the blaze and left the premises after an hour and a half. Five hours later, an arson investigator conducted a warrantless and nonconsensual search at the fire-damaged home, discovering evidence that led to the arson conviction of the homeowners. This Court held that although a burning building creates an emergency justifying a warrantless entry by fire fighters, where reasonable privacy expectations remain in the fire-damaged property after the fire has been extinguished, and a reasonable investigatory time has passed, additional nonconsentual investigation must be pursuant to a warrant or some new emergency. 52 L.W. at 4058.

The search of the Clifford home was viewed by this Court as two-fold, each investigation being examined separately for its constitutionality. The first entry was permissible for the purpose of fighting the fire. The second entry was not, despite the uninhabitable condition of the damaged home. This is because personal belongings remained on the property, and the Cliffords had made every reasonable effort to secure the privacy interests in their home against further intrusion.

The investigation in our case may be examined by a similar two-fold approach. The first segment was permissible as it was conducted from an anticipated and public vantage point. The second, however, made with the express purpose of circumventing Ciraolo's reasonable efforts to exclude the uninvited public, was impermissible for the failure to obtain a warrant and for lack of exigent circumstances.

Shutz's initial ground-level investigation of Ciraolo's home, made without specific information, consent or exigent circumstances, was undertaken to discover evidence of criminal activity. However, it was conducted from publicly-used access areas of streets and sidewalks. At that time, Shutz's purpose in his investigation did not involve a deliberate intrusion into Ciraolo's private spaces.

Stage two of Shutz's investigation cannot be justified by any exception to the warrant requirement for a search of the interior spaces of a private residence, those areas where privacy expectations are exceedingly strong. The aerial search of the inner portions of respondent's house "could only have been a search to gather evidence of the crime. . . ." This is an improper purpose. *Clifford, supra*, 52 L.W. at 4059. A warrantless intrusion into the curtilage "for the purpose of conducting a search for criminal activity" is unconstitutional. *United States* v. *Williams*, 581 F.2d 451, 453 (5th Cir. 1978) and cases there cited. *See also, United States* v. *Hersh*, 464 F.2d 228, 230 (9th Cir. 1972); *Davis* v. *United States*, 327 F.2d 301 (9th Cir. 1964); *People* v. *Superior Court (Spielman)* (1980) 102 Cal.App.3d 342, 162 Cal.Rptr. 295 (inadvertent invasion of curtilage while present for another purpose not a Fourth Amendment violation).

It has long been accepted that the purpose for which a search is made is the key to its legality. A private area can be entered by the government if an emergency does not allow a warrant to be obtained, or even if the police reasonably believe that such an emergency exists. However, the deliberate breach of a reasonable expectation of privacy in an enclosed backyard is an improper purpose.

III

RESPONDENT DID NOT WAIVE HIS FOURTH AMENDMENT RIGHTS BY FAILING TO ENCLOSE HIS BACKYARD

Possibly the most initially attractive argument made by the petitioner is that the police were only doing what any air traveler might do, pass over respondent's backyard through the air. As we have already noted, respondent believes that the police purpose to invade already-declared privacy in a focused manner makes this case quite different from an accidental police observation, or from one obtained in the course of a generalized air patrol. We discuss additional factors concerning petitioner's consent argument at this point.

It must be conceded that respondent did everything which could be required to preserve his privacy unless he is also required to surrender access to air and light. Respondent's home was not adjacent to a government base with the knowledge that government planes inspected his lands as a routine matter in the course of their other duties. (*See United States* v. *Allen*, 675 F.2d 1373 (9th Cir. 1980). There is no evidence of any routine air traffic over respondent's backyard.

The possibility of a glance from a passing aircraft is a slender reed upon which to rest the waiver of a constitu-

tional right to privacy. Of the aircraft which may pass over respondent's backyard,[19] very few are traveling at less than one-quarter mile above the surface. Even fewer are intensely looking at his backyard; even fewer contain government agents seeking evidence of crime. To equate an "open view" with the facts of this case is not only to ignore all of the above factors but to ignore the fact that the airplane making the view in this case contained the "practiced eye" of an expert in marijuana detection from the air who would see what the casual, or even intensely curious, viewer from the air would not see.

Respondent does not challenge the right of the government to use the airspace over his house or any other house. What he does challenge is the assumption that there is no reasonable societal expectation of privacy as to anything which might be seen from the air under any circumstances. We think that there is a reasonable societal expectation to privacy from police surveillance from the air when such surveillance is focused, intended to breach privacy and accomplished by the sharp eye of a trained observer. *Katz* v. *United States*, *supra*, declines Fourth Amendment protection for "what a person knowingly exposes to the public. . . ." (389 U.S. at 351-352.) There was no knowing exposure to the public under the circumstances of this case.

IV

THE ADMINISTRATIVE WARRANT SOLUTION

In discrete areas where the government's inspection needs are obvious, this Court has authorized administrative warrants issued on less than probable cause but

---

[19] There is nothing in the record concerning any air traffic over respondent's home.

still guaranteeing to the people of our nation the protections of the Fourth Amendment against government intrusions into homes, businesses and telephone lines. *See Camera* v. *Municipal Court*, 387 U.S. 523 (1967) and the many cases applying its teachings. *See also*, *Michigan* v. *Clifford*, *supra*. The use of administrative warrants in surveillance situations has been discussed in *United States* v. *Kim*, *supra*, 415 F.Supp. at 1257 and *United States* v. *Broadhurst*, *supra*, ___ F.Supp. ___, ___. Further discussion is not needed as no such warrant was applied for in this case.

V

CONCLUSION

The time to stop warrantless technological surveillance is now, before it gets out of hand and before it changes the nature of our society. The airplane involved in our case does not lift the police above the law or the constitution. Respondent's privacy could not be breached without the authorization of a warrant or a proper exception to the warrant rule.

Respectfully submitted,

MARSHALL WARREN KRAUSE
PAMELA HOLMES DUNCAN
Attorneys for Respondent

KRAUSE, BASKIN, SHELL, GRANT & BALLENTINE
Of Counsel